

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of SBC Communications Inc. ("SBC") and AT&T Corp. ("AT&T") for Authorization to Transfer Control of AT&T Communications of California (U-5002), TCG Los Angeles, Inc. (U-5462), TCG San Diego (U-5389), and TCG San Francisco (U-5454) to SBC, Which Will Occur Indirectly as a Result of AT&T's Merger With a Wholly-Owned Subsidiary of SBC, Tau Merger Sub Corporation.

Application 05-02-027
(Filed February 28, 2005)

**ADMINISTRATIVE LAW JUDGE'S RULING
REGARDING ORA CROSS-MOTION FOR PROTECTIVE ORDER**

This ruling resolves issues raised in the Cross-Motion for a Protective Order, filed on June 20, 2005, by the Office of Ratepayer Advocates (ORA).¹ ORA filed its cross-motion for a protective order calling for procedures regulating discovery for the remainder of this proceeding in a way that preserves both Applicants' right to prepare testimony and ORA's right and duty to investigate and analyze the subject merger. ORA also attached the Supporting Declaration of Christopher Witteman as an attachment to its Cross-Motion. An administrative law judge's (ALJ) ruling dated June 22, 2005, denied the portion

¹ ORA titled its pleading as a "Cross-Motion" in that it was filed in conjunction with ORA's response in opposition to the Applicants' motion filed on June 10, 2005, for a "Discovery Protective Order." A separate ruling was issued on June 22, 2005 regarding Applicants' June 10th motion.

of ORA's cross-motion seeking a three-week extension in the schedule, but permitted responses to filed and deferred consideration of the remaining portions of ORA's cross-motion.

In its Motion, ORA requests a ruling setting out with certain specificity the parties' discovery obligations to one another. Certain of the discovery scheduling issues raised by ORA have already been addressed in the June 22, 2005 ruling. Remaining issues are addressed herein relating to dates certain for the production of all backup documents supporting Applicants' rebuttal testimony, and the depositions of Applicants' key witnesses prior to hearing.

Position of ORA

ORA expresses concern that it will encounter difficulties in obtaining the workpapers and other backup supporting Applicants' "rebuttal" testimony. ORA argues that it has already experienced difficulty obtaining the backup for Applicants' opening testimony. TURN supports ORA's Motion. TURN argues that requiring that Applicants provide backup for their testimony and appear at limited depositions is an appropriate means to level the playing field and to provide for some measure of transparency and full disclosure in this proceeding.

To ensure that it understands the factual bases and backup for Applicants "rebuttal" testimony, as well as any as-yet unproduced workpapers and backup for Applicants' direct opening testimony, ORA noticed the deposition of Applicants' witnesses and asked in the Deposition Notice that Applicants produce such workpapers and supporting documents more or less concurrently with the production and service of their rebuttal testimony. On Tuesday, June 14, 2005, ORA and TURN served on Applicants a revised Notice of Deposition and Request for Backup Documents, essentially seeking to secure the documents supporting Applicants' testimony, as well as the depositions of at

least two of Applicants' key witnesses. The June 14, 2005 Deposition Notice and cover letter was attached to ORA's Motion as Exhibit A. ORA's Deposition Notice was served in place of an earlier notice that sought to depose James Kahan and obtain the backup for his opening testimony only. That earlier notice was withdrawn after Applicants objected.

ORA expresses concern that Applicants will again object to the deposition of their witnesses. The depositions are noticed for San Francisco on July 26 and 28, 2005, respectively, although ORA and TURN indicated a willingness to move dates within the period of July 26 through August 2, 2005. ORA had asked Applicants to inform ORA by June 17, 2005, of whether they planned to object to the deposition notice. As of June 19, 2005, ORA had received no response to its letter. (See Supporting Declaration, at ¶ 2.) ORA thus seeks an order setting dates certain for the notice depositions of Applicants' witnesses.

ORA also moves for a ruling requiring that Applicants provide all the backup for their opening and prepared rebuttal testimony by a date certain. TURN filed a response on June 24, 2005, in support of ORA's request. TURN argues that after Applicants' rebuttal testimony is served on July 8, 2005, intervenors will have only a few weeks to digest that testimony and prepare for hearings. Thus, TURN argues that a protective order should also provide notice to Applicants, now, that they are expected to provide all workpapers and other documents supporting their rebuttal testimony, at or near the time they serve such testimony, as required in the Deposition Notice found as Exhibit A to ORA's Cross-Motion.

TURN asks that Applicants be reminded that evidence developed on a national basis, to the extent it informs such rebuttal testimony, should be produced. (See Ruling Imposing a Sanction, *supra*, at p. 7 (Appendix A to

TURN's response) ("withholding evidence relevant to the issue of cost modeling and costs throughout the various states in which SBC operates ... may have a bearing on costs in California").)

Response of Applicants

In its response to ORA's Cross-Motion, Applicants argue that no "foreseeable problems in completing discovery" as discussed in ORA's motion (*see* Mot. at 12-13) are ripe for resolution by the ALJ. Applicants agree to continue to respond to ORA's discovery consistent with the June 22 Ruling and the ALJ's prior rulings, and to meet and confer with ORA to resolve any disagreements regarding Applicants' responses should they arise. Applicants also agree to meet and confer with ORA regarding its deposition notice of John Polumbo and James Kahan, in the hopes that it will not be necessary to bring that matter before the ALJ.² Because these depositions are not scheduled to take place until July 26 and July 28, however, Applicants believe that parties will have an adequate opportunity to meet and confer in an attempt to resolve differences. Applicants thus argue it would be premature for the ALJ to rule on these issues prior to the meet and confer session.

² SBC explains that it previously objected to ORA's deposition to Mr. Kahan on the grounds that Mr. Kahan was unavailable on the dates ORA identified; that if it went forward the deposition would have to take place in San Antonio, where Mr. Kahan resides; that the notice calls for the re-production of documents previously produced by SBC; and that the deposition was not limited in duration in accordance with federal law and reasonable application of California law. Applicants indicate that they anticipate discussing these and any other issues with ORA during meet and confer, and bringing these matters to the ALJ for resolution only if they cannot be resolved to the mutual satisfaction of the parties.

Location of Depositions

Discussion

It is concluded that ORA has raised valid concerns in seeking establishment of specific deadlines relating to production of discovery and depositions. Although Applicants claim that the concerns raised by ORA are not ripe for resolution by the ALJ, it is still appropriate to set preliminary deadlines for reporting to the ALJ in the event that the planned meet and confer sessions do not produce mutually acceptable results.

Also, ORA's request is reasonable in seeking deadlines for Applicants to produce workpapers and related discovery. ORA proposes that Applicants be required to produce all back up workpapers supporting their testimony within two weeks after the testimony is served. This deadline is reasonable and shall be adopted. Thus, all back up workpapers supporting Applicant testimony shall be due by July 22nd.

The previous June 22nd ALJ ruling stated that discovery relating to the Applicants' Rebuttal Testimony shall be served by July 15, 2005. That ruling did not set any final cut offs for Applicants to respond to all outstanding discovery. ORA in its motion proposed that Applicants be required to respond to all discovery outstanding as of July 1 by July 22, 2005. ORA's proposal, however, assumed a three-week extension in the entire procedural schedule. Applicants thus shall be required to respond to all discovery still outstanding as of June 24th, by July 15th.

With respect to the scheduling of depositions, since parties have agreed to meet and confer regarding scheduling, that process should be allowed to go forward. Nonetheless, if there is going to be an objection either to the schedule or other arrangements, as discussed below, the parties shall inform the ALJ

promptly after conclusion of the meet-and-confer session in order to allow for timely resolution.

TURN raises the issue of whether to require depositions to take place in San Francisco. TURN notes that in response to a prior notice of deposition, Applicants objected to producing witnesses in San Francisco.³ As a noticing party, TURN expresses a desire to participate in that deposition (as do counsel for some of the other intervenors). TURN requests, however, that because it lacks resources to travel across country to take these depositions, that the depositions take place in California.

Given the importance of California as one of Applicants' biggest proposed markets, and the discrepancy in parties' resources, TURN argues that it is only fair that the depositions occur in California. It has already been ruled in this case that Applicants must produce in this proceeding all responsive information and documents, whether or not it is in the hands of Applicants *per se* or in the hands of affiliates, subsidiaries, and/or companies in which Applicants own a 50% or greater share. (See ALJ June 8, 2005 Ruling Regarding ORA's Second Motion to Compel, at Ordering Paragraph 6; *see also* Assigned Commissioner's February 21, 2002 Ruling Imposing a Sanction Against Pacific Bell For Failure to Comply with Discovery Rulings, at p. 8 ("Pacific's actions would set a dangerous precedent of allowing an entity to hide information from the Commission by developing and

³ Applicants have not responded to ORA's request that Applicants inform ORA and TURN whether or not they plan to object to the deposition notice. (See Supporting Declaration at ¶ 2 and Exhibit A.)

maintaining it at one of its sister companies or at its corporate headquarters”⁴))
(Attached as Appendix A to TURN’s Response).

Applicants are directed to seek to find some means of providing accommodation to enable TURN to participate in the depositions within TURN’s resource limits. Accommodation for TURN’s participation should be addressed in the meet and confer sessions that are scheduled. One possible avenue that may be explored is video conferencing whereby TURN (or other interested parties) could participate in the depositions remotely. To the extent that parties cannot work out some mutually acceptable accommodations to allow TURN to participate in the depositions, TURN may advise the ALJ after the meet and confer session so that further action may be considered, as necessary.

IT IS RULED that:

1. The Office of Ratepayer Advocates cross-motion is granted, in part, as set forth below.
2. Applicants shall be required to produce all back up workpapers supporting their testimony within two weeks after the testimony is served, by July 22, 2005.
3. Applicants shall be required to respond to all discovery still outstanding as of June 24th, by July 15th.

⁴ TURN states that this Ruling also provides a reference point for the propriety of Applicants’ initial position, refusing to produce Cingular documents, as discussed in ORA’s Cross-Motion.

4. The meet-and-confer process shall go forward regarding scheduling and logistical arrangements for depositions. If, however, parties cannot reach mutual accommodation either to the deposition schedule or other logistical arrangements, the parties shall inform the ALJ promptly after conclusion of the meet-and-confer session in order to allow for timely resolution, as may be necessary.

5. Accommodation for TURN's participation (or other parties interested in participating) in the depositions shall be addressed in the meet and confer sessions that are scheduled.

Dated July 5, 2005, at San Francisco, California.

/s/ THOMAS R. PULSIFER

Thomas R. Pulsifer
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties for whom an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling Regarding ORA Cross-Motion for Protective Order on all parties of record in this proceeding or their attorneys of record.

Dated July 5, 2005, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.